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UNCLAS SECTION 01 OF 03 BRUSSELS 001662

SIPDIS

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SUBJECT: U.S.-EU COMPETITION CONSULTATIONS EMPHASIZE AREAS
OF CONVERGENCE

¶1. (SBU) SUMMARY: In October 20 annual consultations on competition policy, U.S. and EU officials emphasized areas of convergence on anti-trust policy and opportunities for cooperation and information sharing. A joint FTC-DoJ delegation represented the U.S. at the Brussels talks, while the EU side was led by European Commissioner for Competition Neelie Kroes. Officials discussed abuse of dominance application, mergers, energy policy, aviation, private damage actions, and other sectors. The two sides noted divergence in tests on proportionality, the impact of resale price maintenance (rpm) on consumers, and approaches on direct settlement. The session concluded with an impassioned call from Competition Director General Philip Lowe to bring China into the International Competition Network (ICN) via a joint U.S. - EU effort. END SUMMARY

WE ARE AT A CLOSE CONVERGENCE

¶2. (SBU) In cordial annual U.S.-EU competition policy talks held in Brussels October 20, U.S. and EU competition policy officials emphasized areas of convergence on a number of anti-trust and merger policy issues and explored opportunities for cooperation and information sharing. The joint Federal Trade Commission (FTC) - Department of Justice (DOJ) delegation was led by FTC Chairman William Kovacic and DOJ Assistant Attorney General Tom Barnett. Competition Commissioner Neelie Kroes chaired the EU group, supported by Director General at DG Competition Philip Lowe.

¶3. (SBU) Following opening exchanges by Kovacic and Kroes that focused on mutual agreement and continued dialogue, the delegations shared views on abuse of dominance applications. For the U.S., Barnett noted internal divergence (between the FTC and DOJ) on the recent DoJ USG report on addressing unilateral conduct by firms, with the FTC unable to sign on to the report for process reasons. Kovacic agreed and said the reason for the internal split was an inability to gain consensus among FTC commissioners on the report, which will now be resubmitted and reviewed.

¶4. (SBU) On the report itself, Barnett said USG goals were consistent with those of the Commission: to set up competition rules encouraging economic growth and to promote consumer welfare. He said the report looks at specific types of conduct and recommends conduct-based disproportionality tests to determine whether harm outweighs benefits. Kovacic said the FTC mostly concurred and favored a "light approach," and suggested the greatest danger regarding abuse of dominance was to intervene too much rather than too little.

¶5. (SBU) Kroes responded that there was division in the

Commission as well, even within DG Competition as well as among various legal services regarding many competition issues, including unilateral conduct, but said they find ways to bridge gaps and move forward. She said the EU was in "close convergence" with USG practice on abuse of dominance and said the Commission in the process of examining member state comments before issuing its final report. Both Lowe and Kroes said the Commission did not quite understand the disproportionality test, suggesting the EU effects-based approach was more appropriate for Europe, and put U.S. and EU divergence on the issue down to culture. Lowe said the debate was a bit asymmetric given that the U.S. had not yet seen the Commission's report, and he looked forward to further exchanges on the matter.

TREMENDOUS ADVANCES IN MERGERS

16. (SBU) Kroes then said the Commission will publish, in the next few days, a remedies notice regarding mergers and said the EU's approach to merger remedies is very similar to that of the U.S. Commission competition officials pointed to mergers as one of the most fruitful areas of U.S. - EU cooperation in recent years and said the EU has drawn much from USG views and procedures in crafting its review. Kovacic said the Commission has made "tremendous advances" in mergers and looked forward to continued conversation and joint research.

17. (SBU) The two sides expressed strong interest in proceeding with merger retrospective studies once a timetable could be agreed. Memos will be exchanged in January, with

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the U.S. focusing on North America and the EU on the UK and Germany. Differences remain, however, regarding specific cases. The EU said Phillips-LG may be doable, but Thomson-Reuters was a bit sensitive. Kovacic put Google-DoubleClick forward as a long-term case. Barnett said U.S. and EU staffs would continue to discuss these studies.

18. (SBU) Regarding staff exchanges, Barnett expressed strong interest, but said that DoJ was restricted in its ability, due to clearance concerns, to bring a foreign national on to staff. Kovacic, however, said FTC would be delighted to participate, and the Commission suggested that a European seconded to the FTC could visit DoJ.

SECTORAL ISSUES

19. (SBU) On aviation, Barnett noted the U.S.-EU agreement on Open Skies as a very positive development. He updated the Commission on a number of anti-trust immunities for alliances and said the Sky Team application for immunity, which had been withdrawn due to DoJ and Department of Transportation concerns, had been resubmitted to more specifically address those concerns, which related mostly to domestic spillover, but would likely be approved. He said a decision on the Northwest-Delta merger was close and would be announced in the next several weeks. Barnett said there were still concerns about AA-BA regarding Heathrow slots and said USSG and EU staffs were discussing. Kroes said cooperation on aviation has been excellent and said she was less skeptical on AA-BA.

110. (SBU) Kroes also called attention to the breakthrough on repealing the anti-trust line exemption for shipping and said despite some small divergence in the shipping sector with the U.S., she was "very pleased with our joint cooperation". Kovacic congratulated Kroes on the repeal, but said U.S. prospects for same were essentially dead for now, although the FTC will not give up hope for its chances in the longer term.

111. (SBU) Final political decisions on the EU's 3rd energy

liberalization package will be reached in the first half of 2009, Kroes reported. She said the European Parliament's views on energy competition were very close to those of the Commission and said intensive negotiations with Council, as well as with Parliament, were now taking place. She said the final legislation would address unbundling of energy suppliers from transmission networks, separation of networks, and local ownership. Kovacic said energy policy is one of the most significant issues for the USG, and highlighted a new Congressional mandate prohibiting manipulation of market prices for petrol products. He said the FTC was in the process of considering rules to implement the mandate. He added, however, that the FTC was chary of supplemental legislation that would prohibit price gouging, concerned it could lead to price controls and ceilings and a subsequent reduction of supply. Lowe agreed and said the Parliament had also weighed in on commodity and fuel prices and said the issue would not disappear in the short term.

DIFFERENCES OVER RESALE PRICE MAINTENANCE

¶12. (SBU) The two sides expressed strong divergence over the area of Resale Price Maintenance agreements (RPMs). Commission officials said their research shows that RPMs generally lead to price increases and that it is difficult to find a "robust" demonstration of harm related to RPMs and vertical restraints. Lowe stressed UK cases in particular that clearly showed the negative effects of RPMs and said RPM in general is not a very convincing mechanism to attain efficiencies. FTC officials strongly disagreed, and said that removing RPMs would lead to a change in price as well as a change in demand. The two sides agreed to disagree but to continue discussion of vertical restraint mechanisms in the hopes of finding grounds for collaboration.

¶13. (SBU) Lowe also outlined the launching of white and green papers covering direct settlement and a private damage actions system ahead of adoption of a directive "possible" by ¶2010. Lowe agreed that the U.S. and EU diverged a bit on this issue as well, with the EU stressing strong rigorous public enforcement and collective redress. He said the

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Commission was keen to avoid any directive that would lead to a litigious culture similar to that in the U.S. Lowe added that the Commission was focusing on the issue of harm. Barnett said he was very supportive of the initiative and said he shared Lowe's concerns on excessive litigation, but he cautioned that "pursuit of every possible harm could be a bad thing for consumers" at the end of the day.

CHINA AND THE ICN

¶14. (SBU) At the conclusion of the consultations, Lowe gave an impassioned plea for joint U.S.-EU action to get China into the International Competition Network (ICN). He said the focus should be on pressuring the Taiwanese to change their nameplate (as they have at the UN and WTO) to enable China to participate. To not do so, Lowe warned, "would result in the weakening of the world's competition system by not having them in." Barnett agreed and said the ICN would be the best forum in which to engage China on competition issues, but that we had to be very careful with this difficult issue.

COMMENT

¶15. (SBU) The conclusion of another round of successful annual U.S.-EU competition policy consultations, supports our view that U.S.-EU divergences over competition policy are more over implementation than over legal findings, and in any case are less than those portrayed in the media. END
COMMENT.

[¶16.](#) (SBU) FTC Chair Kovacic has not reviewed this message.

SILVERBERG

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